No. 17-1389

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

DAVID BRAT; BARBARA COMSTOCK; ROBERT WITTMAN, Congressman; BOB GOODLATTE, Congressman; RANDY FORBES, Congressman; MORGAN GRIFFITH, Congressman; SCOTT RIGELL, Congressman; ROBERT HURT, Congressman,

Intervenors/Defendants – Appellants,

ERIC CANTOR, Congressman; FRANK R. WOLF, Congressman

Intervenors/Defendants

and

VIRGINIA STATE BOARD OF ELECTIONS; KENNETH CUCCINELLI, II

Defendants

v.

GLORIA PERSONHUBALLAH, an individual; JAMES FARKAS, an individual

Plaintiffs – Appellees

JAMES B. ALCORN; CLARA BELLE WHEELER; SINGLETON B. MCALLISTER

Defendants – Appellees

and

DAWN CURRY PAGE, an individual

Plaintiff

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA (NO. 3:13-cv-00678-REP-LO-AD)

REPLY BRIEF FOR APPELLANTS

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INTRODUCTION

In their opening brief, Intervenor-Defendants explained that the decision below subjecting them to a half-million-dollar fee award is directly contrary to the binding precedent of the Supreme Court and this Court, and that the district court's analysis is entirely indefensible as a matter of both law and logic. In their response brief, Plaintiffs conspicuously abandon the district court's reasoning and do not attempt to defend any of the four legally erroneous "factors" that the court relied on. Instead, Plaintiffs' lead argument is that the fee award against Intervenor-Defendants "is of little concern" to them, because even if it is vacated they are still "entitled to a full recovery against the State Defendants." *See* Pl. Br. at 2. The State Defendants, for their part, devote their lead argument to explaining why the fee award cannot be "shifted" to them, and why the vacatur of the award against Intervenor-Defendants thus cannot result in "any greater liability" on the part of the State. *See* State Br. at 22.

Both Plaintiffs and the State Defendants thus tacitly recognize that the fee award against Intervenor-Defendants cannot stand, and that the only real question is whether Plaintiffs can instead recover their intervention-related fees and expenses against the State. Intervenor-Defendants have no stake in this dispute and take no position on it, other than to note this Court's ruling that "the burden of intervention-related fees and expenses [lies] with the plaintiff." *Rum Creek Coal*

Sales, Inc. v. Caperton, 31 F.3d 169, 176-77 (4th Cir. 1994).

To the extent Plaintiffs and the State Defendants attempt to defend the fee award against Intervenor-Defendants, their arguments fail. Try as they might, they cannot overcome the clear rule that intervenors who have not "violated anyone's civil rights" cannot be subject to fee liability as long as their intervention was not "frivolous, unreasonable, or without foundation." *Ind. Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754, 761 (1989). Nor do they attempt to claim that Intervenor-Defendants here violated anyone's civil rights, or that their intervention was frivolous, unreasonable, or without foundation. While they half-heartedly contend that a handful of cases have imposed fee awards against intervenors in similar circumstances, they do not make any serious effort to respond to Intervenor-Defendants' conclusive showing that those cases are entirely inapposite. *See* Op. Br. at 19-26.

Significantly, neither Plaintiffs nor the State Defendants even *attempt* to deny that upholding the fee award against Intervenor-Defendants would create a square circuit split and would thus virtually guarantee Supreme Court review. *See* Op. Br. at 52-55. This Court should not let it come to that. Instead, it should faithfully apply the binding precedent that the district court ignored and hold that Intervenor-Defendants cannot be subject to fee liability, as every other court has held on similar facts.

ARGUMENT

I. INTERVENOR-DEFENDANTS CANNOT BE SUBJECT TO FEE LIABILITY BECAUSE THEY DID NOT VIOLATE ANYONE'S CIVIL RIGHTS

In their opening brief, Intervenor-Defendants explained the simple reason why they cannot be held liable for attorney fees under binding Supreme Court precedent. *See* Op. Br. at 14-19. In particular, the Supreme Court squarely held in *Zipes* that "innocent" or "blameless" intervenors—defined as those who have not "violated anyone's civil rights"—cannot be subject to fee liability unless their intervention was "frivolous, unreasonable, or without foundation." 491 U.S. at 761-63. Accordingly, because everyone agrees that Intervenor-Defendants here did not violate anyone's civil rights, and that their intervention was not frivolous, unreasonable, or without foundation, the district court was clearly mistaken to subject them to a fee award.

In their response brief, Plaintiffs all but concede the case. They do not argue that Intervenor-Defendants violated anyone's civil rights, nor do they claim that the intervention was "frivolous, unreasonable, or without foundation." Instead, they argue that Intervenor-Defendants somehow are not "'innocent' or 'blameless' *in the relevant sense*." Pl. Br. at 22 (emphasis added). While they never articulate precisely what they think "the relevant sense" is, binding precedent leaves no doubt. *Zipes* flatly stated that the relevant test is whether the intervenor has "been

found to have violated anyone's civil rights." *Zipes*, 491 U.S. at 762. That rule was grounded in decades of precedent, which made clear that "the logical place to look for recovery of fees is to the losing party—the party legally responsible for relief on the merits." *Id*. at 763 (citation omitted). Accordingly, as this Court has explicitly recognized, "the union intervenor [in *Zipes*] was blameless *because* there was no allegation that it had violated Title VII." *Ohio River Valley Envtl. Coal., Inc. v. Green Valley Coal Co.*, 511 F.3d 407, 416 (4th Cir. 2007) (citing *Zipes*, 491 U.S. at 762) (emphasis added). So too here, Intervenor-Defendants are "blameless" because there is no allegation that they violated the Constitution (or any other law).

Contrary to Plaintiffs' assertion, *Zipes* did not remotely authorize courts to engage in a free-floating balancing test to "determin[e], based on the specific facts presented, whether a fee award against [an] intervenor [is] appropriate" even if the intervenor has not violated any law. Pl. Br. at 21. Quite the opposite: *Zipes* made clear that "Section 1988 simply does not create fee liability where merits liability is nonexistent," and emphasized "the crucial connection between liability for violation of federal law and liability for attorney's fees under federal fee-shifting statutes." 491 U.S. at 762-63. Indeed, as if to guard against precisely the type of confusion now urged by the Plaintiffs here, the Supreme Court's opinion reiterated the same point several times: "[f]ee and merits liability run together"; "[l]iability

on the merits and responsibility for fees go hand in hand"; "[f]ee liability runs with merits liability." *Id*.

Plaintiffs make no attempt to explain how their position can be squared with these binding directives from *Zipes*. Instead, they claim that prohibiting fee awards against non-frivolous intervenors who have not violated federal law would somehow be "contrary to the law of this circuit and numerous other post-*Zipes* cases." Pl. Br. at 25. They are wrong on both points.

A. Circuit Precedent Does Not Support Plaintiffs

With respect to the "law of this circuit," Plaintiffs largely ignore the cases cited by Intervenor-Defendants and focus almost exclusively on this Court's decision in *Ohio River Valley*. Notably, the district court did not cite this case, and for good reason: Far from supporting Plaintiffs' position, *Ohio River Valley* badly undermines it. That case involved a fee award under an entirely different fee standard, against an intervenor that had violated federal law. To the extent the case has any relevance here, it strongly supports Intervenor-Defendants by emphasizing the crucial connection between merits liability and fee liability.

As a threshold matter, *Ohio River Valley* cannot support the district court's view of *Zipes* because its analysis begins from the premise that "*Zipes* does not apply here . . . because it construed Title VII's prevailing party standard rather than the 'whenever appropriate' standard used in [the Surface Mining Control and

Reclamation Act]." 511 F.3d at 416. In other words, *Ohio River Valley* involved an entirely different fee standard, which authorizes a fee award "whenever appropriate." *Id.* That standard is far broader than the standard at issue in *Zipes* (and here), which, as *Ohio River Valley* recognized, does not allow an innocent intervenor to be subject to fees "whenever appropriate," but "*only if* its participation in the litigation was 'frivolous, unreasonable, or without foundation.'" *Id*. (emphasis added). Plaintiffs barely mention this dispositive point, which they relegate to a footnote, Pl. Br. at 22 n.7, but this by itself explains why *Ohio River Valley* provides no support for Plaintiffs' position here.

In any event, instead of supporting Plaintiffs, *Ohio River Valley* cuts strongly against them by reinforcing the principle that "blameless" intervenors like the ones in the present case cannot be held liable for attorney fees. The opinion specifically states that an intervenor must be considered "blameless in the sense that term was used in *Zipes*" as long as it has not "violated" federal law. *Ohio River Valley*, 511 F.3d at 416. Thus, "the union intervenor [in *Zipes*] was blameless because there was no allegation that it had violated Title VII." *Id*. By contrast, the mining company that intervened in *Ohio River Valley* "had violated its duties under [federal law] by submitting permit applications that did not comply with the [law's] requirements." *Id*. For this reason, even if the *Zipes* standard had applied in that case, the intervenor's "submission of allegedly illegal mining permit

applications provide[d] the necessary connection between the substantive provisions of [federal law] and fee liability." *Id*. at 417. That was yet another reason that the fee award was justified in *Ohio River Valley*—and another reason that the fee award is *not* justified here, as nobody has alleged that Intervenor-Defendants violated any law.

Plaintiffs make no serious attempt to grapple with this Court's decision in *Rum Creek*, which held that the fee provision of 42 U.S.C. § 1988 "leave[s] the burden of intervention-related fees and expenses with the plaintiff," because "shift[ing] fees to an intervenor, *who has not violated anyone's civil rights*, would not advance the national policy of vindicating wrongful discrimination." 31 F.3d at 176-77 (emphasis added). Plaintiffs mention this case only in a footnote. They try to distinguish it by claiming that it applies only to plaintiffs who "unsuccessfully oppos[e] a motion to intervene," but not to plaintiffs who have "successfully prevail[ed] on the merits of a claim." Pl. Br. at 19 n.6. Plaintiffs do not suggest any logical basis for this distinction, nor could they. *Rum Creek* derived its holding from *Zipes*, which barred a fee award against an intervenor even though the plaintiffs had "successfully prevailed" over the intervenor's opposition. *Id*. Indeed, *Rum Creek* explicitly described *Zipes* as setting the rule for when "a *prevailing* plaintiff in a civil rights case can recover from an intervening party." *Rum Creek*, 31 F.3d at 176 (emphasis added). Accordingly, both *Zipes* and

Rum Creek plainly require plaintiffs to bear the cost of litigating against innocent intervenors regardless of the issue being litigated, and regardless of whether the plaintiff has prevailed on the merits. *See also Zipes*, 491 U.S. at 765 (stating that intervenors are immune from fee liability even when they make "an argument that brings into question not merely the appropriateness of the remedy but the plaintiff's very entitlement to relief").

Plaintiffs claim to draw some support from this Court's decision in *Jones v. Southpeak Interactive Corp. of Delaware*, 777 F.3d 658, 677 (4th Cir. 2015), which they portray as providing broad "discretion" for district courts to "allocate fees" among different parties in cases like this one. Pl. Br. at 19. But *Jones* stands only for the proposition that trial courts have discretion to allocate fees among defendants *who are properly subject to fee liability*. That case did not involve any intervenors, and said nothing about when the law allows an intervenor to be subject to a fee award. The opinion in *Jones* did not even cite *Zipes*, much less contravene its clear rule prohibiting fees against innocent intervenors.

Finally, Plaintiffs cite a number of cases to suggest that the fee award here is somehow entitled to deferential appellate review, but those cases deferred only to the district court's determination of the discretionary *amount* of a fee award. *See* Pl. Br. at 14-15 (citing cases). By contrast, courts "review de novo the question of whether a party is *eligible* for an award of attorneys' fees under a fee-shifting

statute." *W. Va. Highlands Conservancy, Inc. v. Kempthorne*, 569 F.3d 147, 152 (4th Cir. 2009) (emphasis added); *see also E.E.O.C. v. Great Steaks, Inc.*, 667 F.3d 510, 519 (4th Cir. 2012) (where the applicability of "fee provision" turns on a pure issue of law, "we review de novo"). Accordingly, because this case turns on the purely "legal question" of whether *Zipes* allows a fee award against non-frivolous intervenor-defendants who have not violated anyone's civil rights, this Court must "review de novo." *Grissom v. The Mills Corp*., 549 F.3d 313, 318 (4th Cir. 2008).

B. Out-of-Circuit Precedent Does Not Support Plaintiffs

As for the other "post-*Zipes* cases" that Plaintiffs refer to, Pl. Br at 25, they do not cite anything new beyond the out-of-circuit cases relied on by the district court. Intervenor-Defendants thoroughly explained in their opening brief why those cases are both entirely inapposite here and fully consistent with the *Zipes* rule prohibiting fees against innocent intervenors. Op. Br. at 19-26. In all of the cited cases, the "official capacity" status of both the defendants and the intervenors meant that the state was the real party in interest for purposes of both fee liability and merits liability. "The state (through its [defendant] agents) had committed the civil-rights violation, and thus the state (through its [intervenor] agents) could be held liable for fees." Op. Br. at 23. Plaintiffs barely try to respond to this point, but instead confine themselves to a few perfunctory assertions in the space of a single paragraph. *See* Pl. Br. at 24-25.

Plaintiffs do not deny the "official capacity" status of the intervenors in all of the cited cases, but instead point out that "Section 1988—the basis for [their] fee award—does not itself contain a state action limitation." Pl. Br. at 24. This observation misses the point. As Intervenor-Defendants have explained, the relevant point is that, due to the official-capacity status of the defendants and the intervenors in all of the cases at issue, the state was the "real party in interest" for purposes of *both* the underlying civil-rights violation *and* the fee award. The fee award was thus imposed against the very same party—the state—that was liable on the merits for the violation. That makes the fee award entirely permissible under the *Zipes* rule—and entirely distinguishable from the present case. *See* Op. Br. at 23-24, 32-33. Plaintiffs do not attempt to respond to this point, nor could they.

As the Supreme Court has repeatedly explained, suits for injunctive relief against state officers in their official capacity "are for all practical purposes suits against the State itself," and any fee award imposed against state officials acting in their official capacity likewise must be paid "by the state." *Hutto v. Finney*, 437 U.S. 678, 699-700 & n.32 (1978). Plaintiffs are thus entirely mistaken to insist that any of the cases they cite "involved the imposition of fees against intervenors who could not be found 'liable on the merits.'" Pl. Br. at 25 (citing *Planned Parenthood of Central New Jersey v. Attorney General*, 297 F.3d 253 (3d Cir. 2002)); *see also* State Br. at 35-36 (claiming that the fee award was imposed against the intervenor

New Jersey Legislature "*rather than* the State defendants" (citing *Daggett v. Kimmelman*, 1989 WL 120742 (D.N.J. July 18, 1989)). To the contrary, the fee awards in all of the cited cases were imposed against intervenors who were *official state actors*, which means that the fees were "payable by the States." *Hutto*, 437 U.S. at 693-94. The fee liability was thus imposed on the same party—the state—that was responsible for the underlying merits liability, thereby complying with the *Zipes* rule that "[f]ee and merits liability run together." 491 U.S. at 763. In the present case, by contrast, the fee award was imposed on the Intervenor-Defendants *personally*, even though they are concededly free of any merits liability. That is plainly inconsistent with the clear rule of *Zipes*.

The only other case cited by Plaintiffs is *Charles v. Daley*, 846 F.2d 1057 (7th Cir. 1988), but that is not a post-*Zipes* case. To the contrary, *Charles* was decided a full year before *Zipes*, and thus it says nothing about how to apply the rule that the Supreme Court adopted in *Zipes*. As Intervenor-Defendants explained in their opening brief, *Charles* "squarely contradicts the categorical rule of *Zipes*," and thus "plainly does not survive the Supreme Court's decision in *Zipes* the following year." Op. Br. at 24. Plaintiffs do not even try to respond to this point. They do not attempt to defend the district court's plainly erroneous rationale for distinguishing *Charles* from *Zipes*, *see* Op. Br. at 25, nor do they make any effort of their own to explain how the two decisions can be reconciled. Accordingly, this

Court is bound to follow the clear rule adopted in *Zipes*, and not the out-of-circuit decision in *Charles* that *Zipes* overruled.[1]

II. PLAINTIFFS FAIL TO MEANINGFULLY DISTINGUISH THIS CASE FROM *ZIPES*

Intervenor-Defendants explained at length in their opening brief why the four "factors" relied on by the district court are legally erroneous and woefully inadequate to distinguish the present case from *Zipes*. First, Intervenor-Defendants are every bit as "blameless" as the intervenor in *Zipes*. Op. Br. at 29-35. Second, the "third-party interest" here is every bit as valid and "cognizable" as it was in *Zipes*. Op. Br. at 35-43. Third, the prospect of uncompensated costs for plaintiffs is no different here than it was in *Zipes*. Op. Br. at 43-45. And fourth, this case implicates "judicial economy" concerns every bit as much as *Zipes* did, if not more, because the district court's approach will encourage incumbents to launch collateral attacks against remedial maps instead of risking fee liability through intervention. Op. Br. at 45-47.

[1] The State likewise makes no attempt to reconcile *Charles* with *Zipes*. Instead, the State points out that the Supreme Court denied certiorari in *Charles* after *Zipes*, thus "letting stand the fee award." State Br. at 38 n.128. But as Intervenor-Defendants explained, this point is irrelevant because "it is black-letter law that a denial of certiorari says nothing about the merits of the underlying case." Op. Br. at 25. Plaintiffs dispute the reason for the denial, Pl. Br. at 24 n.9, but it makes no difference because "[t]he denial of a writ of certiorari imports no expression of opinion upon the merits of the case." *United States v. Carver*, 260 U.S. 482, 490 (1923). Neither the State nor Plaintiffs make any attempt to respond to this dispositive point, and thus both tacitly concede that *Charles* cannot possibly survive the Supreme Court's decision in *Zipes*.

While Plaintiffs praise the district court for engaging in a "thoughtful, fact-specific" analysis, Pl. Br. at 25, they conspicuously abandon the district court's reasoning in its entirety. They do not attempt to respond to *any* of Intervenor-Defendants' arguments showing why the district court's analysis was wrong at every turn. Instead, they simply assert in conclusory fashion that the district court's "reasoning is sound, fully consistent with *Zipes*, and well-supported by analogous precedent." Pl. Br. at 26. But saying so does not make it so, and in fact the opposite is true. The district court's reasoning is entirely indefensible, as illustrated by the fact that neither the Plaintiffs nor the State Defendants make any effort to defend it.

Instead of defending the district court's analysis, Plaintiffs assert for the first time on appeal a "justification" not mentioned by the district court; namely, that Intervenor-Defendants should not be considered "blameless" under *Zipes* because "they 'effectively drew their own districts.'" Pl. Br. at 27 (quoting Brief for Appellants at 39, *Wittman v. Personhuballah*, 136 S. Ct. 1732 (2016) (No. 14-1504)). This argument fails for several reasons.

First, and dispositively, for the reasons discussed above, the sole definition of a "blameless" or "innocent" intervenor under *Zipes* is one who has "not been found to have violated anyone's civil rights." 491 U.S. at 762. Because Intervenor-Defendants concededly do not meet that definition, that is the end of the inquiry. Contrary to Plaintiffs' suggestion, the test is not whether the intervenor can be

considered "blameworthy" in some subjective moral sense apart from having committed an actual violation of federal law. Thus, for example, in *Zipes* itself, the union intervenor was considered "blameless" even though it had "bargained for" and *agreed to* the discriminatory seniority benefits through the collective-bargaining process. *Id.* at 763. The union thus bore some legal responsibility for the *creation* of the discriminatory benefits, which made it *more* blameworthy than Intervenor-Defendants here. But nonetheless, that still was not enough to expose the union to fee liability because its collective-bargaining activity did not constitute a violation of federal law. The same conclusion follows here with even greater force: The fact that Intervenor-Defendants may have discussed incumbent-friendly districts with the state legislature did not make them legally responsible for *creating* the districts, much less make them guilty of *violating* any federal law. For that reason, they cannot be considered "blameworthy" under *Zipes*.

Second, while Intervenor-Defendants did indeed argue in their previous briefs that they "effectively drew their own districts" because the state legislature wanted incumbent-friendly boundaries, the district court, at Plaintiffs' urging, squarely rejected that argument and instead held that the legislature drew the districts for its own improper *racial* purposes. Accordingly, it is the Plaintiffs who are seeking "to have it both ways." Pl. Br. at 27. At the merits stage, they vehemently denied that that Intervenor-Defendants had succeeded in effectively

drawing their own districts, and the district court agreed. *See Page v. Va. State Bd. of Elections*, No. 3:13-cv-678, 2015 WL 3604029, at *14 (E.D. Va. June 5, 2015) (finding that incumbents' preferences on districting were "subordinate to" the racial considerations that the legislature prioritized in order to satisfy "the mandatory criteria of compliance with the VRA," prior to any consultation with incumbent officeholders); *see also id*. But now, Plaintiffs are urging the opposite conclusion for purposes of fee liability, claiming that the racial predominance of the redistricting plan can be attributed to the preferences of incumbent officeholders. To the district court's credit, it did not engage in this naked reversal of prior fact-finding, and this Court should not allow Plaintiffs to do so.

Third, even if Intervenor-Defendants did "effectively dr[a]w their own districts," that would be irrelevant to their "blameworthiness" because none of "*their own*" districts was held to be unlawful. Instead, the only district found to be a "racial gerrymander in violation of the Equal Protection Clause" was the "third Congressional District," which was represented by Bobby Scott, an African-American Democrat, who "won by an even larger margin" as a result of the districting plan. *Page*, 2015 WL 3604029, at *1, *17; *see also id*. at *14 ("incumbents were not shown the entire 2012 Plan when they were solicited for their input, but were instead shown only the proposed changes to the lines of *their individual districts*" (emphasis added)). Moreover, while Plaintiffs argue that the

overall plan drawn by the legislature "reduced the political power of African-American voters in Virginia," Pl. Br. at 27, that is both irrelevant to the alleged "blameworthiness" of Intervenor-Defendants and factually incorrect. The Obama Justice Department expressly found that the plan *preserved* minority voting strength and satisfied Section 5 of the Voting Rights Act because it "did not effect any retrogression in the ability of minorities to elect their candidates of choice." 2015 WL 3604029, at *1. Also, Plaintiffs did not bring any Section 2 vote-dilution claim, and thus any *post hoc* argument now regarding a supposed reduction in African-American voting power is entirely unsupported.

III. PLAINTIFFS' ARGUMENTS CONFIRM THAT UPHOLDING THE DECISION BELOW WILL DISTORT THE ADVERSARY PROCESS

In their opening brief, Intervenor-Defendants explained that upholding the decision below will distort the adversary process in two distinct ways that *Zipes* was designed to prevent. First, the risk of fee liability will punish and deter a diverse array of good-faith intervenors from participating in a wide variety of civil-rights cases. This will not only unjustly exclude many people and organizations who have a concrete stake in such litigation, but will also deprive courts of invaluable arguments, information, and perspectives that serve to enhance the quality of judicial decision-making. Op. Br. at 47-51. Second, the decision below will also encourage state Attorneys General to engage in collusive litigation by abandoning the defense of laws or policies that they oppose on policy grounds,

secure in the knowledge that few if any private intervenors will be willing to take up the defense due to the risk of ruinous fee liability. Op. Br. at 51-52.

A. The Decision Below Will Wrongly Punish and Deter Good-Faith Intervenors

Plaintiffs do not seriously dispute that the massively increased risk of fee liability created by the decision below will have a significant deterrent effect on good-faith intervenors in a wide variety of civil-rights cases, which is exactly what *Zipes* was intended to prevent. While they dismiss this argument as somehow "offensive," Pl. Br. at 27, they do not and cannot deny the reality that minority voters, candidates, and interest groups routinely intervene to defend the creation of majority-minority districts against racial-gerrymandering challenges that are indistinguishable from the present case. *See, e.g.*, *Shaw v. Reno*, 509 U.S. 630 (1993) (ruling in favor of white Republican plaintiffs, striking down the creation of majority-minority districts as an unconstitutional racial gerrymander). Nor do Plaintiffs deny that non-profit groups routinely intervene in civil-rights cases under Section 1983 to defend campaign-finance regulations against First Amendment challenges, to defend gun regulations against Second Amendment challenges, and to defend affirmative-action programs against Fourteenth Amendment challenges. *See* Op. Br. at 48-50.

Plaintiffs do not and cannot offer any *principled* reason why the intervenor-defendants in such cases are any different from the Intervenor-Defendants here:

They act as "functional defendants," they "intervene specifically" to defend challenged laws, they prolong litigation and require plaintiffs to "shoulder responsibility for paying [extra] attorney's fees," their "third party interest" will be declared "invalid" or "non-cognizable" whenever their legal defense fails, and they often are *less* able to bring "collateral attacks" than Intervenor-Defendants here would have been. JA148, 158. Plaintiffs cannot articulate any possible way such good-faith intervenors could escape fee liability under the logic of the decision below, other than sheer ideological hostility to the claims that the plaintiffs in those cases would present. But of course, the rule of *Zipes* cannot be applied in such a nakedly partisan manner, shielding good-faith intervenors from fee liability only when they seek to defend laws and policies favored by the Democratic Party.

In trying to draw some distinction that would cabin the reach of the decision below, Plaintiffs are remarkably candid in advocating what appears to be a racially discriminatory rule. According to them, "holding *white* incumbent congressional representatives accountable for defending a racial gerrymander they believe advanced their political interests is a far cry from a [similar] holding [against] the NAACP." Pl. Br. at 29 (emphasis added). But other than relying on the constitutionally impermissible factor of race, Plaintiffs never explain why minority incumbent officeholders or allied groups like the NAACP should be treated any differently when they intervene to defend the creation of majority-minority

districts that are alleged to be *Shaw* racial gerrymanders. Accordingly, if the decision below is upheld, it will inevitably result in unjust fee awards being imposed on good-faith intervenors all across the racial and political spectrum.

To be sure, Plaintiffs point out that the decision below "did not adopt a rule that *all* losing intervenors are liable for fees," but rather adopted a balancing test. Pl. Br. at 28 (emphasis added). But in fact, the same factors driving the decision below *guarantee* that intervenors will be subject to fees whenever they act as "functional defendants" who unsuccessfully defend a state law against civil-rights plaintiffs if the state defendants stand down. JA148. And in any event, the deterrent effect comes from the increased *risk* of fee liability, as Plaintiffs themselves acknowledge that "an intervenor faces a choice as to whether the rewards of litigation outweigh the risks." Pl. Br. at 31. Under the bright-line rule of *Zipes*, good-faith intervenors can rest assured that they have no risk of incurring fee liability for asserting a non-frivolous defense as long as they have not violated anyone's civil rights. By contrast, the decision below changes the calculus dramatically by adopting a four-factor balancing test that is easily susceptible to result-oriented application, making it impossible for potential intervenors to have any confidence that fees will not be assessed. Thus, even assuming the NAACP and other liberal interest groups will not "necessarily and categorically be liable if

[they] intervene[] in a lawsuit to protect [their] interests," Pl. Br. at 29, they will face an astronomically increased *risk* of liability if the decision below is upheld.

B. The Decision Below Will Encourage Collusive Litigation, While Faithfully Applying *Zipes* Will Not

Plaintiffs also do not make any serious attempt to deny that the decision below will create an incentive for state Attorneys General to side with politically sympathetic plaintiffs and abandon the defense of laws that they oppose, while few if any intervenors will be willing to step in due to the threat of fee liability. Instead, Plaintiffs indignantly deny the insinuation that any such political collusion possibly could have occurred in *this* case, and then immediately pivot to the argument that faithful application of the rule of *Zipes* would create an "equally baleful" problem. Pl. Br. at 29-31. They are mistaken.

First, putting aside the particulars of the present case, it is indisputable that the decision below will provide a strong incentive for state officials to refuse to defend (or not pursue appeals) against politically or ideologically aligned plaintiffs. This does not necessarily imply any bad faith on the part of the state officials, who can often justify refusal to defend a law on the grounds that their oath of office precludes them from defending state laws they deem unconstitutional, or that an attempted appeal would be futile (as the State Defendants claimed here, *see* Pl. Br. at 6-7). But of course, even when such determinations are made in good faith, they are often heavily influenced by political and ideological views. Accordingly, a

robust application of *Zipes* is essential to encourage the participation of intervenors for the sake of ensuring a healthy adversarial process in cases brought by plaintiffs who are politically aligned with state officials.

Second, with respect to the present case, it is undeniable and not denied that the Attorney General's refusal to appeal the district court's decision in favor of the plaintiffs conferred a direct benefit on their mutual political party and advanced their mutual ideological sympathies. Contrary to Plaintiffs' claims, Intervenor-Defendants are not "improperly impugn[ing]" anyone by pointing out this obvious fact. Pl. Br. at 29. This simply reflects the reality that, particularly in inherently partisan redistricting litigation and other politically charged cases, there will be an obvious temptation for state officials who are aligned with the plaintiffs to mount a less vigorous defense than intervening defendants who are politically or ideologically *opposed* to the plaintiffs' cause. The categorical rule of *Zipes* encourages such vigorous intervention, while the district court's result-oriented "four factor" test greatly discourages it. Consequently, *Zipes* eliminates the temptation for elected state officials to unilaterally override state laws they and their allies disfavor by confessing error or eschewing appeal (since the law will be defended by intervenors). By contrast, the district court's evisceration of *Zipes* encourages state officials to abandon state laws in cases where there their interests

are aligned with plaintiffs', thus creating, at minimum, an "appearance" of political collusion. *Cf. Buckley v. Valeo*, 424 U.S. 1, 26-27 (1976).

Plaintiffs claim that the Attorney General here served the adversary process well because he could have acted even *more* favorably to Plaintiffs by ordering an abandonment of the state's defense *immediately* after he took office, in the middle of proceedings in the trial court and after summary judgment briefing had already been completed, instead of waiting until the trial was over and then declining to appeal. Pl. Br. at 30. But of course, that does not remotely prove that the Attorney General mounted the same type of vigorous defense that a Republican counterpart would have done, up through and including a full appeal. While Plaintiffs suggest that the chance of prevailing on appeal was so slim that it would have amounted to nothing more than "throwing good money after bad," *id.*, that claim is clearly belied by even a cursory glance at the merits of the case. Not only was the district court's decision divided 2-1, but after Intervenor-Defendants appealed, the Supreme Court granted full briefing and oral argument rather than disposing of the case by summary affirmance.

Plaintiffs and the State Defendants suggest that the "clear error" standard of review was an insurmountable hurdle that made it futile to appeal, but closely analogous precedent shows that to be false. For example, in *Easley v. Cromartie*, 532 U.S. 234 (2001), the Supreme Court considered a similar racial

gerrymandering challenge involving a district where race and politics were highly correlated. After a three-judge district court found that the legislature's predominant motive was racial, the Supreme Court reversed on the ground that this factual finding was "clearly erroneous" given the presence of other equally possible political motives. *Id*. at 258. The same argument was at least as plausible in the present case.

Moreover, Intervenor-Defendants' appellate argument was *not* that the district court made any erroneous *factual* finding. Instead, they argued that it was *legally* erroneous for the district court to find that race "predominated" in the redistricting process simply because the legislature correctly recognized that compliance with Section 5 of the Voting Rights Act was "non-negotiable" and "paramount," when the legislature *concededly* was also motivated by "'a desire to protect incumbents'" and "'partisan political considerations.'" *See* Brief for Appellants at 14-17, *Wittman*, 136 S. Ct. 1732 (No. 14-1504), (quoting *Page*, 2015 WL 3604029, at *13). That argument presented a pure legal issue, subject to *de novo* review: does a legislature's recognition of the "paramount" importance of Section 5 under the Supremacy Clause mean that race "predominated" in the districting process? The Justices manifestly deemed the issue sufficiently important to merit their full attention, which is why they granted full briefing and argument. The only reason the Court could not resolve the issue was because the Attorney

General declined to appeal. *See* Op. Br. at 4-7. Accordingly, this case perfectly illustrates how a state Attorney General who is politically sympathetic to plaintiffs can fail to ensure the full and vigorous working of the adversary process.[2]

Finally, Plaintiffs suggest that a faithful application of the *Zipes* rule protecting intervenors from fee awards would create the potential for "gamesmanship." In particular, they suggest that it would somehow encourage "state government official[s]" to refuse to defend state laws that they (and, more importantly, the voters who elected them) *support*, and then recruit outside intervenors to "step[] in to assume the defense" of the laws for the purpose of denying fee awards to plaintiffs. Pl. Br. at 30-31. This is entirely fanciful. As a sheer practical matter, no state Attorney General would ever abandon the defense of a state law that he and his voters *support* solely for the bad-faith purpose of frustrating a plaintiff's potential fee award. Unlike the situation where an Attorney General is politically *aligned* with the plaintiffs, there is no prospect that an

[2] Plaintiffs claim that the Virginia Attorney General's office mounted a vigorous defense against a redistricting challenge brought by Democratic plaintiffs in *Bethune-Hill v. Virginia State Board of Elections*, No. 14-cv-852 (E.D. Va.), but in fact the state defendants there also declined to file any brief defending the Republican redistricting map in the Supreme Court—either opposing review or defending on the merits. Instead, they left the task of defending the law in the Supreme Court to the Republican legislature, which intervened as a defendant. *See* "Letter from counsel for Defendants-Appellees, Virginia State Board of Elections, et al., notifying the Clerk they will not file a separate brief on the merits," *Bethune-Hill v. Virginia State Board of Elections*, No. 15-680 (U.S. Oct. 12, 2016). Thus, *Bethune-Hill* further *confirms* the need to have intervenor-defendants that will mount vigorous defenses that state officials, like the Attorney General here, will not assert against their political allies.

Attorney General will tell those who elected him that he refuses to defend a law that they and he support, since his political and ideological self-interest will always command the opposite. Tellingly, Plaintiffs cannot point to any instance where anything like this has ever occurred, in contrast to the numerous cases where government officials who are aligned with plaintiffs have refused to defend laws that they *oppose*. *See, e.g.*, *North Carolina v. N.C. State Conference of the NAACP*, 137 S. Ct. 1399, 1399 (2017) (statement of Roberts, C.J.) (certiorari denied because "[s]hortly after" "a new Governor and state Attorney General assumed office," they sided with plaintiffs and "moved to dismiss the [state's] petition"); *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2668 (2013) (state law struck down without Supreme Court merits review because "state officials have chosen not to" "defend [its] constitutionality").

In any event, even if Plaintiffs' concern were remotely realistic, the only possible solution would be to adopt a narrow exception to the *Zipes* rule in the vanishingly rare case where state officials abandon the defense of a law that they *support* solely to manipulate the plaintiffs' fee entitlement. The solution would emphatically *not* be to throw out the entire *Zipes* regime, which is precisely what would result from upholding the decision below by imposing fee liability that would punish and deter good-faith intervenors in a wide variety of cases where their participation is supposed to be encouraged.

CONCLUSION

For the reasons above, Intervenor-Defendants respectfully ask this Court to reverse the judgment of the district court and vacate the award of fees and costs against the Intervenor-Defendants below.

June 29, 2017

Respectfully submitted,

/s/ Michael A. Carvin

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,233 words, excluding the parts of the brief exempted by rule, as counted using the word-count function on Microsoft Word 2007 software.

June 29, 2017

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CERTIFICATE OF SERVICE

I hereby certify that, on this 29th day of June, 2017, I electronically filed the original of the foregoing document with the clerk of this Court by using the CM/ECF system. I certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system. Pursuant to this Court's Local Rule 31(d), I will also file one paper copy of the foregoing document with the clerk of this Court.

June 29, 2017

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